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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 HOMEFRONT, INC.

14 Plaintiff,

15 v.

16 CASHMERE CRAFTS, INC. and SAFDAR
17 WANI

18 Defendants.

Case No. C 05-00597 PJH

**PLAINTIFF HOMEFRONT'S OPPOSITION
MEMORANDUM TO DEFENDANT
WANI'S MOTION TO SET ASIDE THE
DEFAULT JUDGMENT**

Date: December 7, 2005
Time: 9:00 a.m.
Courtroom: 3, 450 Golden Gate Ave., 17th Fl.
San Francisco

The Honorable Phyllis J. Hamilton

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1 **I. INTRODUCTION**

2 Defendant Safdar Wani knowingly and intentionally chose not to respond to the Complaint
 3 despite the numerous opportunities he received from plaintiff Homefront, Inc. Mr. Wani is a highly
 4 educated and sophisticated individual who now feigns ignorance. Such ignorance is neither credible
 5 nor justifiable. It is not credible because the indisputable record shows that Mr. Wani repeatedly
 6 received unambiguous warnings that his actions and inactions could lead to his personal liability.
 7 Mr. Wani's ignorance is not justifiable because, regardless of his fabricated misunderstanding, he was
 8 fully aware of his obligations and was represented by counsel during the period Homefront sought
 9 entry of his default as well as when Homefront moved by noticed motion for Mr. Wani's default
 10 judgment. Either Mr. Wani ignored his counsel's advice or he received inadequate advice; neither are
 11 grounds to set aside the default. The only mistake Mr. Wani made was to misjudge Homefront's
 12 determination to see this matter through to judgment. Mr. Wani has acted inequitably and he should
 13 not be rewarded.

14 Should the Court be inclined to grant Mr. Wani a second chance, however manifest his
 15 culpable conduct, Homefront asks that it be awarded its attorney's fees to date as a condition
 16 precedent. This would restore Homefront to its position at the commencement of this action, which is
 17 what Mr. Wani seeks for himself.

18 **II. DEFENDANT WANI AND THE HISTORY OF THE LITIGATION**

19 Homefront is a designer and seller of rugs and other textile products. Complaint, ¶ 9. What
 20 sets Homefront apart from its competitors are Homefront's original, copyrighted designs. Homefront's
 21 competitors may offer products of similar construction, but their designs are tribal or otherwise in the
 22 public domain. Among those who seek to compete with Homefront are Safdar Wani and his
 23 associated companies Cashmere Crafts and The Cottage Arts Promotion, Inc.

24 Homefront had the misfortune of encountering Mr. Wani at the 2004 San Francisco
 25 International Gift Fair. Operating under the name of defendant Cashmere Crafts, Mr. Wani displayed
 26 and offered for sale copies of Homefront's copyrighted works. Complaint, ¶ 14; Declaration of
 27 Steven C. Kohn in Support of Plaintiff Homefront's Opposition Memorandum to Defendant Wani's
 28

1 Motion to Set Aside Default Judgment ("Kohn Decl."), ¶ 2. Following a confrontation at the trade
 2 show, Homefront retained legal counsel in San Francisco. After counsel conducted its own
 3 investigation, Mr. Wani received by overnight courier an unambiguous demand letter that insisted that
 4 Mr. Wani and Cashmere Crafts cease sales of infringing copies of Homefront's works. See
 5 September 14, 2004 letter from Marc M. Gorelnik to Safdar Wani, Ex. A to Declaration of Marc M.
 6 Gorelnik in Support of Plaintiff Homefront's Opposition Memorandum to Defendant Wani's Motion
 7 to Set Aside Default Judgment ("Gorelnik Decl.").

8 Mr. Wani refused to comply with Homefront's demands. Instead, Mr. Wani asserted that he
 9 had a container load of rugs bearing Homefront's designs ready for shipment. Gorelnik Decl., ¶ 3. He
 10 offered to sell them to Homefront. *Id.* Frustrated with Mr. Wani's refusal to respect Homefront's
 11 copyrights, and with the February, 2005 San Francisco International Gift Fair a month away,
 12 Homefront's counsel prepared a draft complaint for copyright infringement and transmitted it to
 13 Mr. Wani. See January 12, 2005 letter from Marc M. Gorelnik to Safdar Wani, Ex. B to Gorelnik
 14 Decl. In the cover letter, Homefront's counsel stated:

15 You are well aware of Homefront's specific complaints that Cashmere Crafts has
 16 infringed Homefront's registered copyrighted works. Both companies are free to
 17 compete in the marketplace for chain-stitched rugs and other goods. However,
 18 such freedom does not extend to the taking of the other's copyrighted designs.
 Through both correspondence and phone calls you have been warned against
 future sales or offering for sale of goods incorporating Homefront's designs.

19 You have mentioned the existence in India of a container full of products that
 20 incorporate designs we have objected to on behalf of Homefront. I have warned
 21 you that exporting these goods from India and selling them would give rise to
 significant legal liabilities. Your proposal that Homefront purchase these goods
 from Cashmere Crafts is entirely unacceptable.

22 Last year at the San Francisco Gift Fair your company displayed and offered for
 23 sale many rug designs that infringed Homefront's copyrighted works. This year's
 24 Gift Fair is a month away. Homefront does not object to your presence at the Gift
 25 Fair and does not fear your fair competition. However, there is no reason for
 Homefront to compete against copies of its own original designs. I enclose for
 26 your consideration a DRAFT complaint for copyright infringement and unfair
 27 competition. Should Cashmere Crafts (or its agent) display or offer for sale at the
 Gift Fair any designs that infringe on Homefront's works, I am authorized to
 immediately file and serve the complaint.

Homefront creates original designs to differentiate its goods in the marketplace and to add to their appeal. It should not and will not be forced to compete against Cashmere Crafts or anyone else for sales of Homefront's own original designs.

Id.

Notwithstanding these express warnings, Mr. Wani displayed and offered for sale infringing copies of Homefront's works. However, Mr. Wani eschewed use of the "Cashmere Crafts" name and instead offered the infringing goods under the banner of "Cottage Arts Promotion." Homefront followed through on its threat to file suit and Mr. Wani was served with the Complaint and Summons while present at the trade show.

Mr. Wani promptly contacted Homefront's counsel and requested additional time in which to respond to the Complaint, Gorelnik Decl., ¶ 5, thereby evidencing his awareness that a response was due. Homefront agreed to provide all defendants with a further thirty days to respond to the complaint, and Mr. Wani agreed to obtain the approval of all defendants to the stipulation. See February 23, 2005 letter from Marc M. Gorelnik to Safdar Wani, *Id.*, ¶ 6 and Ex. C thereto. Homefront's letter transmitting the stipulation continued to urge Mr. Wani to retain counsel. ("I strongly encourage defendants to retain counsel to represent them in this action. I have made this suggestion in the past, and you have declined.") The stipulation, which only defendant Wani executed, expressly provided until March 31, 2005 for Mr. Wani "to answer or otherwise respond to the Complaint for Copyright Infringement and Unfair Competition." *Id.* ¶ 7 and Ex. D thereto.

Mr. Wani continued to willfully ignore his obligation to respond to the Complaint. Prior to taking Mr. Wani's default, he was given fair notice:

In February 2005, we offered you an additional 30 days to respond to the Complaint, making your Answer due on March 31, 2005. We have not yet received an Answer or other response from you. I have advised you on multiple occasions to retain counsel, a step you have not taken. Owing to your failure to answer, to retain counsel, or to otherwise undertake a defense in this matter, please be advised that we intend to take your default.

See April 20, 2005 letter from Marc M. Gorelnik to Safdar Wani, Gorelnik Decl., ¶ 8 and Ex. E thereto. This correspondence prompted Mr. Wani to contact Homefront's counsel on April 22.

Mr. Wani stated that he believed that the matter had been resolved by his signature on a document,

1 although there was no rational basis for such a belief. The only document he signed was his
2 agreement to file an Answer by March 31, 2005.

3 Hoping to disabuse Mr. Wani of his unfounded and disingenuous belief that, notwithstanding
4 direct and written communications to the contrary, he need not respond to the Complaint, Homefront's
5 counsel again put Mr. Wani on notice that Homefront would seek his default. However, Mr. Wani
6 would be provided with still more time to respond to the Complaint:

7 I have shown you every courtesy in giving you additional time to seek legal
8 counsel and to respond to the Complaint. It is apparent from our conversation of
9 today that you have willfully misconstrued our previous communications. You
10 tell me today that you believed this matter "was over" in view of the document
11 you signed earlier, but the only document you signed was a stipulation extending
12 the time for your Answer to the Complaint to March 31, 2005. It is now April 22.

13 My client has been more than patient with you. It has now been ten (10) weeks
14 since you were personally served with the Complaint and eight (8) weeks since
15 you received a generous extension of time to respond. You have not used this
16 past extension of time - or the additional three weeks since March 31 - to seek
17 counsel or file an Answer. You now ask for more time, but I have no illusion that
18 you sincerely intend to defend yourself in this matter.

19 Accordingly, we will move forward with entering your default in this matter.
20 However, we will not file our papers with the Court until Wednesday, April 27.
21 Before that date, you should file your Answer or retain qualified counsel to seek
22 from the Court an extension of time. Qualified counsel means an attorney
23 admitted to practice in the Northern District of California who is authorized to
24 make an appearance on your behalf.

25 See April 22, 2005 letter from Marc M. Gorelnik to Safdar Wani, Gorelnik Decl., ¶ 9 and Ex. F
26 thereto.

27 On the deadline set for Mr. Wani, on April 27, he finally contacted counsel, who in turn
28 contacted Homefront's counsel. While the attorney-client representation had not yet been formalized,
29 Mr. Eric Goodman stated that he would respond the next day to confirm his representation and to state
30 whether Mr. Wani was willing to enter into consent judgment. Gorelnik Decl., ¶ 10. On this basis,
31 Homefront set aside its plans to seek Mr. Wani's default. *Id.* Mr. Goodman did not respond as
32 promised, so Homefront sent a reminder letter on April 29. See April 29, 2005 letter from Marc M.
33 Gorelnik to Eric Goodman, Gorelnik Decl., ¶ 11 and Ex. G thereto.

34 Mr. Goodman confirmed in writing his representation of Mr. Wani on May 3, 2005. See

1 May 3, 2005 letter from Eric Goodman to Marc M. Gorelnik, Gorelnik Decl., ¶ 12 and Ex. H thereto.
 2 Mr. Goodman indicated that Mr. Wani's "current pursuit of an informal resolution of this case is
 3 contingent upon your continued grant of an extension to file an answer to [Homefront's] complaint."
 4 *Id.* There was no "current pursuit of an informal resolution." Only the vague notion that Mr. Wani
 5 would consider a stipulated injunction. The conditional nature of Mr. Wani's willingness to enter into
 6 settlement discussions, informed by his historic lack of cooperation, was not acceptable to Homefront.

7 Plaintiff will not agree to any further extensions of time for Mr. Wani to answer
 8 the Complaint. This does not mean that plaintiff is adverse to entering into an
 9 appropriate consent judgment and permanent injunction with Mr. Wani and the
 other defendants, but plaintiff will no longer wait for Mr. Wani to file a defense.

10 See May 4, 2005 (transmitted 10:28 a.m.) letter from Marc M. Gorelnik to Eric Goodman, Gorelnik
 11 Decl., ¶ 13 and Ex. I thereto. Homefront requested entry of Mr. Wani's default at approximately
 12 5:00 p.m. that day without having heard from Mr. Goodman.

13 During the first week of May, counsel for the parties met informally at the annual meeting of
 14 the International Trademark Association. Mr. Goodman indicated that Mr. Wani would agree to enter
 15 into a consent judgment and asked that Homefront's counsel prepare such documents. Homefront
 16 prepared a form of consent judgment and transmitted it on June 10, 2005. See June 10, 2005 letter
 17 from Marc M. Gorelnik to Eric Goodman, Gorelnik Decl., ¶ 14 and Ex. J thereto. The cover letter
 18 stated:

19 Enclosed please find a form of Consent Judgment acceptable to my client. You
 20 will immediately note that there is no monetary demand. This is a gesture intended
 21 to promote an early conclusion. However, **Homefront will certainly seek all its
 costs and fees should it be necessary to bring this matter before the Court.** In
 22 order to make this Consent Judgment work, however, defendant Cottage Arts
 Promotion must join.

23 *Id.*, (emphasis added). Homefront did not receive a prompt response to the draft consent judgment
 24 and eleven days later sent a further letter, which stated in part:

25 I made very clear in [my June 10] letter that Homefront would seek entry of
 judgment as well as an award of attorney's fees in the absence of a settlement.
 26 Because you have not responded, I can only conclude that your client(s) are not
 27 interested in settling the matter and raised the notion of settlement only in order to
 force Homefront into a futile and expensive exercise. Please let me know today if
 your client(s) are prepared to enter into a settlement.

1 See June 21, 2005 letter from Marc M. Gorelnik to Eric Goodman, Gorelnik Decl., ¶ 15 and Ex. K
2 thereto.

3 Mr. Wani's counsel responded the next day that "we have forwarded a copy to our client for
4 approval and he has requested a meeting with us to discuss the document. The meeting will occur on
5 Friday, June 23 [sic], 2005." See June 22, 2005 letter from David A. Berstein to Marc M. Gorelnik,
6 Gorelnik Decl., ¶ 16 and Ex. L thereto. This request for more time was reasonable, although it
7 continued to evidence Mr. Wani's apparent lack of urgency in dealing with this matter.

8 June 23, 2005, came and went without a meeting between Mr. Wani and his counsel. Indeed,
9 there was no word from Mr. Wani's counsel. Accordingly, on June 29, Homefront filed and served its
10 motion for entry of default judgment against Mr. Wani. On July 8, nine days after filing and serving
11 the motion and two weeks after last hearing from Mr. Wani's counsel, Homefront finally received a
12 response to its settlement proposal of June 10. The purported reason for the delay was that Mr. Wani
13 "has been extremely busy of late and recently moved and, as such, we were unable to have a
14 meaningful conversation with him" until July 8. See July 8, 2005 letter from David Berstein to Marc
15 M. Gorelnik, Gorelnik Decl., ¶ 17 and Ex. M thereto.

16 Notwithstanding the entry of his default and Homefront's repeated warnings that default
17 judgment would be sought, Mr. Wani couldn't be bothered to respond to Homefront's settlement
18 proposal. Even after filing and service of the motion for entry of default judgment, it took nine days
19 for Mr. Wani to make some time to meet with his attorneys. Quite aside from Mr. Wani's
20 inattentiveness to this matter, his requested changes to the consent judgment were unacceptable to
21 Homefront. See July 12, 2005 letter from Marc M. Gorelnik to David A. Berstein, Gorelnik Decl.,
22 ¶ 18 and Ex. N thereto.

23 Neither Mr. Wani nor his counsel opposed the motion for entry of default judgment. On the
24 day the Court entered the default judgment against Mr. Wani, he directly contacted Homefront's
25 counsel. Gorelnik Decl., ¶ 19. Counsel explained to Mr. Wani that default judgment had been entered
26 and that Homefront would file a motion for attorney's fees and costs. Mr. Wani stated that he would
27 proceed without counsel. *Id.* Homefront's counsel reported this contact to Mr. Wani's attorney. See
28

1 August 17, 2005 letter from Marc M. Gorelnik to David A. Bernstein, Gorelnik Decl., ¶ 20 and Ex. O
 2 thereto. Mr. Bernstein responded the next day that his firm no longer represented Mr. Wani. See
 3 August 18, 2005 letter from David Bernstein to Marc M. Gorelnik, Gorelnik Decl., ¶ 21 and Ex. P
 4 thereto.

5 Homefront served Mr. Wani on August 19, 2005, with a Notice of Entry of Default Judgment
 6 and received no response. (A similar Notice had previously been served on Mr. Wani's counsel.) On
 7 September 16, 2005, Homefront timely filed a motion for attorney's fees and costs, which was served
 8 on Mr. Wani. Again, this elicited no response from Mr. Wani or counsel. For two months after
 9 August 18, Homefront never heard from Mr. Wani or counsel. Finally, on October 19, 2005, one
 10 week before the hearing on Homefront's fee request, Mr. Kashif Haque telephoned Homefront's
 11 counsel. Mr. Haque indicated that he represented Mr. Wani and would be filing a motion to set aside
 12 the default, which he did on October 21, 2005.

13 Subsequent to the filing of the instant motion, in which Mr. Wani blames his prior counsel for
 14 his current predicament, Homefront asked that Mr. Wani waive his attorney-client privilege as to
 15 communications with his prior counsel.¹ See October 26, 2005 letter from Marc M. Gorelnik to
 16 Kashif Haque, Gorelnik Decl., ¶ 22 and Ex. Q thereto. However, Mr. Wani refused Homefront's
 17 request as "overbroad and unacceptable." See October 27, 2005 letter from Kashif Haque to Marc M.
 18 Gorelnik, Gorelnik Decl., ¶ 23 and Ex. R thereto. Moreover, Mr. Wani's counsel asserted that the
 19 advice of counsel was beside the point since "at issue is Mr. Wani's state of mind, and Mr. Wani's
 20 declaration provides information thereto." *Id.*

21 **III. APPLICABLE LEGAL STANDARD**

22 A defendant seeking to set aside a default judgment normally must demonstrate "mistake,
 23 inadvertence, surprise or excusable neglect. Fed.R.Civ.P. 60(b)(1). "[T]he 'good cause' standard that
 24

25 ¹ Inasmuch as Mr. Wani impugns the Goodman Law Group for his own culpable conduct, the Court
 26 and Homefront are entitled to know whether Mr. Wani acted in conscious disregard of his counsel's
 27 advice.
 28

governs the lifting of entries of default under Fed. R. Civ. P. 55(c) govern the vacating of a default judgment under Rule 60(b) as well." *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001) (hereinafter "*TCI*"). Those three factors are: (1) whether the defendant's culpable conduct led to the default; (2) whether the defendant has a meritorious defense; and (3) whether reopening the default judgment would prejudice the plaintiff. "As these factors are disjunctive, the district court [is] free to deny the motion [to vacate] if any of these factors [is] true." *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004) (internal citation omitted).

A mistake may be one of fact or law, but in either case it must relate to defendant's duty to respond to the complaint, rather than to the merits of plaintiff's claim or other collateral matter. *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999). The mistake of fact must be reasonable under the circumstances. Relief from a default judgment will not be granted where the failure to respond reflects the defendant's conscious desire to avoid defending the suit. *TCI*, 244 F.3d at 697 ("a defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and *intentionally* failed to answer.") (emphasis in original) (internal citation omitted); *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 690 (9th Cir. 1988); *Taylor v. Boston & Taunton Transp. Co.*, 720 F.2d 731, 732-733 (1st Cir. 1983). What constitutes excusable neglect "is at bottom an equitable [determination], taking account of all relevant circumstances surrounding the omission. These include ... the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993).

Litigants are accountable for the acts and omissions of their attorneys. Whether a default is "excusable" depends on whether the neglect of the defaulting party *and its counsel* was excusable. The client's blamelessness is *immaterial* if the default resulted from "culpable conduct" by the attorney. *Pioneer Investment Services*, 507 U.S. 380 at 396; *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) ("parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1).").

As shown below, Mr. Wani's default resulted from his own calculated conduct. He was repeatedly instructed to consult an attorney and file an answer. Even after retaining an attorney, Mr. Wani failed to file an answer or to oppose the motion for default judgment. Mr. Wani lacks a meritorious defense because he remains liable even were he merely a commissioned salesperson, as he claims. Finally, Homefront is not a large company. It has incurred significant costs in this litigation. Should relief from default be granted to Mr. Wani, Homefront will be financially handicapped as compared to its position at the beginning of this litigation. This prejudice can be cured only by restoring to Homefront the fees and costs it has incurred to date.

IV. WANI IS NOT ENTITLED TO RELIEF FROM THE DEFAULT JUDGMENT

Mr. Wani cannot show that his conduct was excusable. Indeed, his disrespect for the legal process is painfully obvious. Mr. Wani has not demonstrated that he has a meritorious defense. If the Court intends to provide Mr. Wani with his requested relief, then Homefront is also entitled to be restored to its position at the outset of this litigation in order to avoid prejudice.

A. Mr. Wani's Culpable Conduct is Manifest

Mr. Wani is not entitled to relief from the default judgment unless he can establish that his – and his attorney's – conduct lacked culpability. To meet his burden, Wani makes conclusory claims of mistake and excusable neglect that are wholly incredible. Wani cannot escape the default judgment because his failure to respond to the Complaint was willful and deliberate.

In his papers, Mr. Wani cites extensively to *TCI*, the most recent detailed explication by the Ninth Circuit on relief from default judgment. In *TCI*, the appellate court reversed as an abuse of discretion the district court's refusal to set aside defendant Knoebber's default. The facts of *TCI* are instructive and contrast quite sharply with the facts now before this Court.

- Defendant Knoebber was distraught over the death of her husband, whose supplemental life insurance policy was the subject of the litigation. Knoebber was under the care of a psychiatrist for severe depression and was medicated with strong psychoactive drugs.
- While Knoebber was in the process of moving with her children from Livermore, California to Tampa, Florida, she was named in a cross-claim. She was formally served in Florida and did

1 not timely file an answer.

- 2 • *Two days* after Knoebber's answer was due and without warning or notice, the cross-claimant
- 3 sought her default, which the clerk of the court promptly entered.
- 4 • Almost immediately after entry of Knoebber's default, the cross-claimant moved for entry of
- 5 default judgment.
- 6 • Knoebber did not timely oppose the noticed motion for default judgment, but did finally retain
- 7 counsel who, in advance of the hearing on the motion, attempted to make an appearance on
- 8 behalf of Knoebber. However, the district court had already granted the unopposed motion
- 9 and refused to set aside the default judgment.

10 Safdar Wani is no Janet Knoebber. Unlike the grieving Janet Knoebber, there is no evidence
 11 whatsoever that any medical, psychological or other factors compromised Safdar Wani's ability to
 12 understand and respond to the Complaint. Mr. Wani does assert, however, that he is an immigrant
 13 unfamiliar with the legal system in the United States. Mr. Wani may be an immigrant, but he is also a
 14 sophisticated businessman who has received the benefit of a college education at the University of
 15 North Carolina. See Declaration of Mike Santoni, ¶¶ 3 - 4 and Ex. A thereto. As for Mr. Wani's
 16 alleged unfamiliarity with the United States legal system, it appears that he has received at least one
 17 summons related to traffic offenses, to which he responded. *Id.*, ¶ 5. If Mr. Wani can understand the
 18 need to respond to a traffic citation, then he surely must have appreciated the need to respond to the
 19 Complaint, particularly after his repeated communications with Homefront's counsel.

20 This Court's entry of default judgment culminated a lengthy sequence of warnings and
 21 renewed opportunities afforded to Mr. Wani, who chose – for his own reasons – not to respond until
 22 more than two months after entry of judgment.

23 **1. Wani's Claim of Mistake is Unreasonable**

24 Wani's assertion that he was unaware of his duty to respond to the Complaint is objectively
 25 unreasonable.

- 26 • He was specifically warned in January, 2005, that his display and sale of infringing copies of
- 27 Homefront's works at the San Francisco International Gift Fair "would give rise to significant

1 legal liabilities." Indeed, he was provided with a copy of a draft Complaint that named Wani
2 personally.

- 3 • Following filing and personal service of the Complaint, Mr. Wani contacted Homefront's
4 counsel to request additional time in which to respond, thereby evidencing his awareness that a
5 response was due.
- 6 • Mr. Wani executed a stipulation agreeing to respond to the Complaint by March 31, 2005,
7 once again showing his awareness that a response was due
- 8 • When Mr. Wani did not respond to the Complaint, on April 20, 2005 he received advanced
9 written notice that Homefront would take his default. ("Owing to your failure to answer, to
10 retain counsel, or to otherwise undertake a defense in this matter, please be advised that we
11 intend to take your default.")
- 12 • Mr. Wani then disingenuously asserted, contrary to logic and fact, that he believed that the
13 matter was concluded when he signed an agreement to respond to the Complaint by March 31.
- 14 • Homefront immediately corrected Mr. Wani's contrived misunderstanding and agreed to wait
15 until April 27 to seek his default, urging him to retain qualified counsel.

16 There can be no doubt that Mr. Wani, even as a *pro se* litigant, was well aware of his duty to
17 respond to the Complaint. He was warned in January and served in February. He was advised to
18 retain counsel and signed an agreement to respond to the Complaint by March 31. Finally, he was
19 given written notice on April 20 and 22 that his default would be taken owing to his failure to respond
20 to the Complaint. These facts are well documented and they soundly rebut any notion that Mr. Wani's
21 failure to respond was a mistake, let alone a reasonable mistake.² In *TCI*, by contrast, default and
22 default judgment were sought immediately without any notice to the defendant.

23
24 ² Defendant's memorandum of law contains several factual assertions that are unsupported in the
25 accompanying Declaration of Safdar Wani. Among these is the claim that Homefront's counsel
26 "informed Mr. Wani that his answer to the complaint is due May 2, 2005." Defendant's memorandum
27 at page 3, line 10. As the factual record reflects, the last communication from Homefront's counsel to
28 Mr. Wani was an April 22 letter reiterating the March 31 due date for an answer and stating that
defendant's default would be taken on April 27.

1 Belatedly, on April 27 – the limit of Homefront's forbearance to seek his default – Mr. Wani
 2 finally contacted an attorney, Mr. Eric Goodman. Following Mr. Goodman's call to Homefront's
 3 counsel, Homefront again set aside its plans to take Mr. Wani's default. A week later, as a represented
 4 party, Mr. Wani set down conditions for his cooperation. He would not engage in settlement efforts
 5 unless he received yet more time to respond to the Complaint. This condition was not acceptable to
 6 Homefront, which had endured many months of futility. Homefront gave one final warning and then
 7 sought entry of Mr. Wani's default, which the Clerk of the Court entered on August 17, 2005.

8 In his papers, Mr. Wani asserts that he "felt secure that either a responsive pleading will be
 9 filed or an extension of time to do so would be sought and received." Wani Decl., ¶ 5. Thereafter,
 10 Mr. Wani asserts that there was a "dispute" with his counsel "over the deposit." *Id.*, ¶ 6. Mr. Wani
 11 suggests, but does not expressly state, that his default was a direct consequence of a fee dispute with
 12 his attorney. Of course, Mr. Wani presents only one side of the story.³

- 13 • Did Mr. Wani actually authorize Mr. Goodman to prepare and file a response to the
- 14 Complaint? If not, then his "secure" feeling that a response would be filed was
- 15 unreasonable.
- 16 • Assuming Mr. Goodman conditioned his appearance on receipt of an appropriate
- 17 retainer, and further assuming that Mr. Wani knew of this condition, why did Mr. Wani
- 18 create a dispute that prevented Mr. Goodman from moving forward?

20 ³ Notwithstanding Homefront's express request, Mr. Wani has refused to waive his attorney-client
 21 privilege with regard to his communications with his prior counsel. This is fundamentally unfair to
 22 Homefront for three reasons: (1) The parties are now before the Court on Mr. Wani's request for relief
 23 from default; (2) Mr. Wani lays the blame for his default, at least in part, on his prior counsel; and (3)
 24 allowing the privilege prevents Homefront from learning whether Mr. Wani's failure to respond to the
 25 Complaint was due to counsel's or Mr. Wani's culpable conduct. *Chevron Corp. v. Pennzoil Co.*, 974
 26 F.2d 1156, 1162 (9th Cir. 1992) ("The privilege which protects attorney-client communications may
 27 not be used both as a sword and a shield. Where a party raises a claim which in fairness requires
 28 disclosure of the protected communication, the privilege may be implicitly waived.") (internal
 citations omitted). *See also United States v. Amlani*, 169 F.3d 1189, 1196 (9th Cir. 1999) (defendant
 may not shield access to the very information that plaintiff must refute, otherwise plaintiff would be
 forced to rely on defendant's self-characterization of events). There is no reason for Mr. Wani to
 shield those communications except to conceal his own culpable conduct.

1 Mr. Wani then asserts that "he mistakenly believed that" the entry of default caused the loss of
 2 "the case and of all [of his] rights and remedies." Wani Decl., ¶ 7. At this point in time, by his own
 3 admission, Mr. Wani was represented by counsel. If he failed to get advice from counsel, Mr. Wani
 4 acted unreasonably. And if he sought advice from Mr. Goodman, it is inconceivable that
 5 Mr. Goodman would have offered such an errant view of the law. And if Mr. Goodman misled
 6 Mr. Wani, however unlikely, the law does not provide relief from default. The client's blamelessness
 7 is *immaterial* if the default resulted from "culpable conduct" by the attorney. *Pioneer Investment*
 8 *Services*, 507 U.S. 380 at 396 ("the proper focus is upon whether the neglect of respondents *and their*
 9 *counsel* was excusable.") (emphasis in original).

10 Notwithstanding the past futility of seeking Mr. Wani's cooperation, Homefront refrained from
 11 seeking entry of Mr. Wani's default judgment from May 6 to June 29. The purpose of the delay was to
 12 explore whether settlement might be possible. Homefront transmitted a draft Consent Judgment on
 13 June 10, but Mr. Wani could not be bothered to address the matter. His counsel represented that
 14 "Mr. Wani has been extremely busy of late." Consequently, Mr. Wani did not meet with his counsel
 15 to discuss the June 10 proposal until July 8, 2005. By then, Homefront had noticed its motion for
 16 default judgment.

17 Defendant Wani was never genuinely mistaken about his obligation to respond to the
 18 Complaint. And if he ever was mistaken, he was repeatedly corrected, although it never resulted in
 19 the filing of a responsive pleading. Finally, Mr. Wani's efforts to lay the mistake at the feet of his
 20 counsel are not credible.

21 **2. Wani's Failure to Respond to the Complaint Was Knowing and Deliberate**

22 Relief from default will be denied where the default resulted from defendant's "culpable
 23 conduct." *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984); *Benny v. Pipes*, 799 F.2d 489, 494 (9th
 24 Cir. 1986). A defendant should not be able to cause the default and then later seek relief from it.
 25 *Meadows v. Dominican Republic*, 817 F.2d 517, 521-522 (9th Cir. 1987); *Action S.A. v. Marc Rich &*
 26 *Co., Inc.*, 951 F.2d 504, 507 (2nd Cir. 1991). The Ninth Circuit affirmed the default judgment in
 27 *Benny v. Pipes, supra*, because the defendants had actual notice of the complaint, conclusively shown
 28

1 by defendants' request for more time to respond, yet had failed to respond. Similarly, defendant Wani
 2 had actual notice of the complaint, confirmed by his request for more time to respond. Like the
 3 defendants' in *Benny*, Mr. Wani's conduct is culpable.

4 "Culpable" does not mean "evil." It means inexcusable. Thus, culpability and excusable
 5 neglect are opposite sides of the same coin. Accordingly, if neglect is inexcusable, relief from default
 6 will be denied due to defendant's culpable conduct. *TCI*, 244 F.3d at 698. Mere failure to respond to
 7 a lawsuit of which the defaulting party has actual knowledge may not be "culpable" conduct in every
 8 case. Such failure is not culpable where defendant offers "a credible, good faith explanation negating
 9 any intention to take advantage of the opposing party, interfere with judicial decision making, or
 10 otherwise manipulate the legal process." *Id.* at 697. It is clear that "choosing" to miss deadlines in
 11 view of medical and family emergencies is excusable, as is neglect resulting from ongoing
 12 psychological problems.

13 Not every excuse, however, comprises excusable neglect. There must be a legally cognizable
 14 justification. In particular, simply choosing not to deal with a complaint is not excusable and is thus
 15 culpable conduct. *Franchise Holding II*, 375 F.3d at 926 (conduct held culpable where defendant
 16 failed to respond after receiving advance notice that default would be sought); *Gucci America, Inc. v.*
 17 *Gold Center Jewelry*, 158 F.3d 631, 634 (2nd Cir. 1998) (deliberate decision not to respond to
 18 complaint comprises culpable conduct); *Conetta v. National Hair Care Ctrs., Inc.*, 236 F.3d 67, 75
 19 (1st Cir. 2001).

20 Like the defendants in aforementioned cases, Mr. Wani – a represented party – failed to
 21 respond to the complaint despite many warnings that his default would be sought. In view of the
 22 voluminous factual record and the fact that Mr. Wani had the benefit of legal counsel, there cannot be
 23 any doubt that his failure to respond to the complaint was knowing and willful. His sole excuse, that
 24 he is an immigrant unfamiliar with the United States legal system, is wholly incredible in view of his
 25 college education and past scrapes with our legal system.

26 **B. Wani Lacks a Meritorious Defense**

27 The party seeking relief from default bears the burden of showing a defense that might make
 28

the result at trial different than that reached by default. "If, however, the defendant presents no meritorious defense, then nothing but pointless delay can result from reopening the judgment." *TCI*, 244 F.3d at 697. Failure to present a meritorious defense is ground for denial of relief. *Franchise Holding II*, 375 F.3d at 926 (litigant "had to present district court with specific facts that would constitute a defense.") Where a party has engaged in willful misconduct or a deliberate failure to respond, "the mere existence of a meritorious defense does not prohibit default judgment." *Ackra Direct Marketing Corp. v. Fingerhut Corp.*, 86 F.3d 852, 857 (8th Cir. 1996). Conversely, absent a meritorious defense, no amount of faultlessness by defendant will justify setting aside the default judgment.

To demonstrate a meritorious defense, the defendant's moving papers should contain:

- a proposed answer;
- a declaration regarding the facts supporting the defense(s); and
- a legal memorandum concerning the legal defense(s).

Simple denials and conclusory statements do not comprise a defense sufficient to vacate a default judgment. *Franchise Holding II*, 375 F.3d at 925; *Foy v. Dicks*, 146 F.R.D. 113, 116 (E.D. Pa. 1993).

Homefront sued Mr. Wani for copyright infringement and unfair competition. Under the Copyright Act:

"[T]he owner of a copyright ... has the following exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

* * *

- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

1 17 U.S.C. § 106. In its complaint against Mr. Wani, Homefront alleged that defendants "infringe
 2 Homefront's exclusive rights in and to the identified works through violation of each of the exclusive
 3 rights listed in 17 U.S.C. § 106." Complaint, ¶ 22. Following entry of Mr. Wani's default, the
 4 allegations of the complaint are accepted as true. *Adriana Int'l Corp. v. Luis & Co.*, 913 F.2d 1406,
 5 1414 (9th Cir. 1990).

6 The essence of Mr. Wani's defense is that he "was merely a commission salesperson for [co-
 7 defendant] Cashmere Crafts, Inc." and that he "never infringed any of" Homefront's copyrights.
 8 Mr. Wani asserts that he has no control over Cashmere Crafts. Wani Declaration, ¶ 9. Counsel for
 9 Mr. Wani argues that a commissioned salesperson's actions "cannot result in personal liability."
 10 Defendant's Memorandum at page 4, lines 25-27.⁴

11 As a threshold matter, Mr. Wani's legal conclusion that he did not infringe Homefront's
 12 copyrights is not entitled to any weight. To show a meritorious defense, Mr. Wani must allege
 13 exculpatory facts, not assert legal conclusions. "A mere general denial without facts to support it is
 14 not enough to justify vacating a default or default judgment." *Franchise Holding II*, 375 F.3d at 926.
 15 Similarly, counsel's assertion that a commissioned salesperson cannot incur liability is a legal rather
 16 than factual argument, although even as a legal argument it is without merit. Copyright liability arises
 17 from either *doing* or *authorizing* certain proscribed acts, not from the actor's self-identification.

18 Defendant Safdar Wani was present at both the July, 2004 and February, 2005 San Francisco
 19 International Gift Shows. It is self-evident that Mr. Wani displayed goods at these events, which exist
 20 solely for the purpose of sales and promotion of the exhibitors' goods. Mr. Wani's act of displaying
 21 copies of Homefront's copyrighted works is a direct violation of Homefront's exclusive rights under
 22 17 U.S.C. § 106(5) ("the copyright owner has the exclusive right ... in the case of ... pictorial, graphic,
 23 or sculptural works ... to display the copyrighted work publicly."). It is immaterial whether or not
 24

25 ⁴ Counsel's assertion that "Mr. Wani did not manufacture, purchase, import, export or distribute any of
 26 Plaintiff's copyrighted works" is not supported in the factual record. See Defendant's Memorandum at
 27 page 4, lines 23-24. In any event, the scope of the Copyright Act is not so narrow.

Mr. Wani appeared in San Francisco as a commissioned salesperson. The only issue is whether Mr. Wani distributed or displayed copies of Homefront's works. Mr. Wani does not and cannot dispute these facts. Indeed, it would be absurd if Mr. Wani asserted that he sought to sell visual works without offering samples or illustrations to his potential customers.

V. HOMEFRONT HAS BEEN PREJUDICED BY WANI'S CONDUCT

This Court may condition relief from a default judgment "upon such terms as are just." Fed. R. Civ. P. 60(b). Courts are allowed to impose conditions on the setting aside of a default, as well as upon vacating a default judgment. *Nilsson, Robbins et al. v. Louisiana Hydrolec*, 854 F.2d 1538, 1546-1547 (9th Cir. 1988) ("we now hold that it is appropriate to condition setting aside a default upon the payment of a sanction."). On appeal in *Nilsson* was the district court's requirement, as a condition of granting relief from default, that the defaulting party pay the plaintiff's attorney's fees. In affirming, the Ninth Circuit noted:

By conditioning the setting aside of a default, any prejudice suffered by the non-defaulting party as a result of the default and the subsequent reopening of the litigation can be rectified. According to Wright, Miller & Kane, the most common type of prejudice is the additional expense caused by the delay, the hearing on the Rule 55(c) motion, and the introduction of new issues. Courts have eased these burdens by requiring the defaulting party to provide a bond to pay costs, to pay court costs, or to cover the expenses of the appeal. The use of imposing conditions can serve to promote the positive purposes of the default procedures without subjecting either litigant to their drastic consequences.

* * *

The condition most commonly imposed is that the defendant reimburse the plaintiff for costs incurred because of the default. In some cases, it may also be appropriate for the defendant to be required to post bond to secure the amount of the default judgment pending a trial on the merits.

Id. at 1547 (internal citations omitted).

As set forth in Homefront's motion for attorney's fees and costs, Homefront incurred \$39,218 in attorney's fees and costs *exclusive* of its motion for attorney's fees and its opposition to the instant motion to vacate the default judgment. Outside of counsel's initial investigation, the preparation and filing of the Complaint, and the entry of Cashmere Crafts' default, the rest of these activities will have been for naught if Mr. Wani is relieved of his default. In addition to all of Homefront's futile pre-default activities, Homefront's attorney's fees motion will have been wasted. Moreover, Homefront

1 has incurred substantial fees in connection with Mr. Wani's instant motion.

2 Homefront is a small, family-run business. It lacks a boundless budget to fund this litigation.
 3 Kohn Decl., ¶ 4. If Mr. Wani gets the "do over" that he seeks through this motion, equity requires that
 4 Homefront be returned to the same position had Mr. Wani timely responded to the Complaint. All of
 5 Homefront's other fees and costs must be recouped. Otherwise, Homefront is necessarily
 6 compromised in its ability to pursue this action. *Id.* This would be of little moment to a large
 7 corporation, but it is quite significant to a small business like Homefront. Accordingly, should the
 8 Court be inclined to relieve Mr. Wani of his default, such relief should be conditioned on Mr. Wani's
 9 prior payment to Homefront of:

10	Homefront's fees and costs from March 1, 2005	\$23,104
11	(date answer was due) through entry of default	
12	judgment	
13	Homefront's fees and costs in connection with the	\$7,751
14	fee motion	
15	Homefront's fees and costs in connection with	\$10,750 (estimate)
16	opposing this motion ⁵	
17	TOTAL	\$41,605

18 Gorelnik Decl., ¶ 24.

19 Mr. Wani should not be rewarded with a tactical advantage, i.e., forcing Homefront to
 20 needlessly incur unrecompensed legal expenses, as a consequence of his default and subsequent relief.
 21 Homefront must be restored to the *status quo ante* just as Mr. Wani asks for himself.

22 VI. CONCLUSION

23 Mr. Wani is not entitled to relief from the default judgment. His default followed from his
 24 knowing conduct, whether through indifference or design. Homefront took his default only after

25 _____
 26 ⁵ Should defendant Wani's motion for relief from default be denied, Homefront will supplement its fee
 27 request to include its fees and costs associated with its opposition.
 28

1 repeated warnings and additional opportunities to cure. Even when represented by counsel, Mr. Wani
2 declined to answer, timely move for relief, or even to oppose the noticed motion for default judgment.
3 Mr. Wani casts aspersions at his counsel, but even were his attorney neglectful – of which there is no
4 credible evidence – that neglect is imputed to Mr. Wani. Regardless of Mr. Wani's culpable conduct,
5 he lacks a meritorious defense. Finally, unless Homefront is restored to its financial position at the
6 beginning of this action, it would be severely prejudiced by the relief sought by Mr. Wani.

7 Dated: November 16, 2005.

Respectfully submitted,

8 TOWNSEND AND TOWNSEND AND CREW LLP

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10 By: 
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12 *Attorneys for Plaintiff*
13 HOMEFRONT, INC.
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